1888

ABAYESWARI DEBI v. SIDHESWARI DEBI.

make the order, this Court can interfere under s. 15 of the Charter Act. Therefore the only question that we have to consider is whether the order complained of is one which the Magistrate could make under s. 144 of the Code. The section says that: "In cases where, in the opinion of a District Magistrate, a Sub-Divisional Magistrate, or of any other Magistrate specially empowered by the Local Government or the District Magistrate to act under this section, immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order, stating the material facts of the case and served in manner provided by s. 134, direct any person to abstain from a certain act," &c., &c. Now by the words "a certain act" we understand that it must be a definite act. We have considered the order passed in this case, and we are of opinion that the acts which the petitioner is directed to abstain from are not acts which come within the meaning of the words "a certain act." She is directed not to collect rents from the ryots of two pergunnahs; no particular ryots are mentioned, but the rent is not to be collected from the ryots of two pergunnahs generally. We do not think that such an order as this comes within the words "certain act." Upon this ground alone we set aside the order and make the rule absolute.

H. T. H. *Rule made absolute and order set aside.*

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

PANNA LALL (DECREE-HOLDER) *v.* KANHAIYA LALL (JUDGMENT-DEBTOR).* 1888 *November* 19.

Insolvency—Civil Procedure Code, 1882, *ss.* 336, 337—*Act VI of* 1888—*Debt not in schedule—Execution of decree obtained against insolvent for such debt—Scheduled debts.*

A person, who has taken the benefit of the insolvent sections of the Civil Procedure Code, and who is undischarged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest in execution of such decree, merely because his property is

* Appeal from Order No. 267 of 1888, against the order of J. F. Stevens, Esq., Judge of Gya, dated the 5th of June 1888.

1888

PANNA LALL v. KANHAIYA LALL.

in the hands of the Receiver in insolvency. Such a person is liable to arrest under the circumstances and in accordance with the procedure provided for by the Civil Procedure Code Amendment Act (VI of 1888).

ONE Kanhaiya Lall Bhaiya, having been declared an insolvent under s. 351 of the Civil Procedure Code, his property and effects became vested in a Receiver. In his application to be declared an insolvent, Kanhaiya Lall referred to the fact that litigation was then pending between himself as a defendant and one Lutchmi Narain Das as a plaintiff, but his schedule did not show any sum as owing to Lutchmi Narain Das.

Lutchmi Narain subsequently obtained a decree against Kanhaiya Lal, and applied under s. 353 of the Civil Procedure Code to have his name inserted as a creditor in the insolvent's schedule. This application was however refused, and he then took out execution of his decree by attachment of certain monies payable to the Receiver. Subsequently the decree-holder assigned his decree to one Panna Lall, and the attachment referred to was withdrawn.

Panna Lall, on the 4th February 1888, applied in execution to attach the person of his judgment-debtor, and a warrant was issued for his arrest. The judgment-debtor, who had not obtained his discharge under either ss. 351 or 355 of the Code, being brought up before the Court, the District Judge, on the 11th February 1888, released him under s. 336 of the Code on security being found for the decretal amount, giving him liberty to apply within one month's time to be declared an insolvent in respect of the judgment-debt.

On the 5th June 1888 the judgment-debtor applied (during the pendency of the first insolvency) to be declared an insolvent in respect of the judgment-debt; but the District Judge, on reconsideration of the matter, held that no second adjudication in insolvency could be made, and that the original adjudication and declaration being good against all the world, the judgment-debtor could not, pending the insolvency, be arrested.

Mr. *Linton* for the appellant.—The original judgment-creditor not being a scheduled creditor, his assignee should have been allowed to execute the decree, the more so as the original decree-holder had applied to be inserted as a creditor in the schedule

and this application had been refused. The applications in the matter were all made before Act VI of 1888 came into force, and no notice was necessary under the old Act.

1888

PANNA LALL v. KANHAIYA LALL.

Baboo *Kali Kissen Sen* for the respondent.—The order declaring the insolvency is an order *in rem*, and is good against all the public, and that being so, execution cannot issue against the insolvent.

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

PETHERAM, C.J.—This is an appeal from an order of the District Judge of Gya refusing to execute a decree by attachment of the judgment-debtor's person, and the reason which he has given for that is, that the judgment-debtor had filed his petition of insolvency and had given up his property to the Receiver under that petition, and he relies upon the sections of the Code of Civil Procedure relating to insolvency as showing that, after he had done that, he was not liable to arrest at the suit, I suppose, of any creditor whose debt was owing before the time of his petition.

The particular debt in respect of which this applicant had obtained a decree and wished to arrest the judgment-debtor was a debt which the judgment-debtor had not included in his schedule, and we think that the learned Judge was wrong in the view which he took that the judgment-debtor was relieved from the liability to arrest in respect of that debt by the Code of Civil Procedure. The right to arrest or to attach the person of the judgment-debtor in execution of decree is a right which is created by the Code, and was an absolute right, and being created as an absolute right it could only be taken away or qualified by subsequent legislation, and subsequent legislation which was clear in its intention. The only section of the Code which takes away that right is s. 357, and s. 357 says that, where an insolvent has been discharged under the preceding sections, he shall not be arrested or imprisoned on account of any of his scheduled debts. But that qualification is expressly limited to the scheduled debts, and in our opinion the liability to arrest under this Code remained the same as it was before in the case of debts which do not appear in the schedule. It is clear that in this case the debt,

1888

PANNA LALL v. KANHAIYA LALL.

in respect of which judgment was obtained, did not appear in the schedule, and therefore, in our opinion, the right of the judgment-creditor to attach his debtor by the arrest of his person was not taken away by s. 357, or by any of the insolvency sections, and at that time that right remained the same as it was before; and consequently we think the learned Judge was wrong in the conclusions which he came to that he was prevented from arresting this man under this section. But what escaped the learned Judge's attention, and the attention of both the learned gentlemen who have argued this case here, is the fact that the whole of the law upon this subject has been changed by Act VI of 1888. This Act takes away the right of the judgment-creditor to arrest his debtor and to put him in prison simply for the debt. A right to arrest under certain circumstances is retained, but it is a right to put the man in prison where he has the means of paying and will not pay as a means of compelling him to do that which he could do, and the inference from this provision is, that except for that purpose persons are not to be arrested, and therefore the provisions here have been inserted which provides that the arrest comes in but only under some circumstances.

We think then that the procedure which was adopted in respect of which this order was made is not applicable to the present condition of things, and that if the judgment-creditor wishes to enforce his remedy by proceedings under Act VI of 1888 he must make a new application to the Judge under that Act. At the same time we think that the Judge was wrong in the view which he took of the insolvency sections of the Code of Civil Procedure. Those sections do not afford any answer to an application of that kind in respect of an unscheduled debt; and we think that, if an application of that kind is properly made before him, it ought to be granted, notwithstanding the fact that the debtor has filed his petition, this particular debt not having been inserted in the schedule. With these remarks we decline to interfere, because the law is changed, and under the circumstances we think that there ought to be no costs.

T. A. P. *Appeal dismissed.*

Before Mr. Justice Pigot and Mr. Justice Rampini.

DINESH CHUNDER ROY, MINOR, REPRESENTED BY HIS NEXT FRIEND DURGA KANT ROY CHOWDHRY, MANAGER UNDER THE COURT OF WARDS (PLAINTIFF), *v.* GOLAM MOSTAPHA AND OTHERS (DEFENDANTS).* 1888 *June* 26.

DINESH CHUNDER ROY CHOWDHRY, MINOR, REPRESENTED BY HIS NEXT FRIEND DURGA KANT ROY CHOWDHRY (PLAINTIFF), *v.* FAHAMIDUNNESSA BEGUM AND OTHERS (DEFENDANTS).†

DINESH CHUNDER ROY CHOWDHRY AND ANOTHER, MINORS, REPRESENTED BY THEIR NEXT FRIEND DURGA KANT ROY CHOWDHRY, MANAGER UNDER THE COURT OF WARDS (PLAINTIFFS), *v.* NISHI KANT GUNGOPADHYA AND ANOTHER (DEFENDANTS).‡

Court of Wards Act (Bengal Act IX of 1879), *s.* 55—*Bengal Act III of* 1881, *s.* 7—*Suit on behalf of ward by Manager without sanction of the Court of Wards—Sanction after appeal, Effect of.*

In the absence of some order by the Court of Wards authorising the bringing of a suit, a suit instituted by a manager on behalf of a ward must be dismissed.

A suit was instituted in the Court of the First Subordinate Judge of Dacca on behalf of a ward by his manager without the order or sanction of the Court of Wards, and proceeded to judgment without any such order or sanction. The suit was partially decreed; and the manager appealed to the District Judge for that portion of the claim which had been dismissed by the Court of first instance. At the hearing of the appeal, an application was filed on behalf of the appellant, accompanied by a letter giving sanction to the institution of the suit the appeal and other proceedings connected therewith, with retrospective effect from the date of its institution. The Judge dismissed the suit. The plaintiff appealed to the High Court.

* Appeal from Appellate Decree No. 1506 of 1887, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 23rd of May 1887, affirming the decree of Baboo Beni Madhub Mitter, Subordinate Judge of Dacca, dated the 28th of December 1885.

† Appeal from Appellate Decree No. 1519 of 1887, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 26th of April 1887, affirming the decree of Baboo Chunder Mohun Mukerji, Munsiff of Munshigunge, dated the 16th of February 1886.

‡ Appeal from Appellate Decree No. 1507 of 1887, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 27th of April 1887, affirming the decree of Baboo Moti Lal Sirkar, Second Subordinate Judge of Dacca, dated the 30th of March 1886.

1888

DINESH CHUNDER ROY v. GOLAM MOSTAFHA.

Held, having regard to s. 55 of the Court of Wards Act, 1879, as amended by s. 7 of Bengal Act III of 1881, the lower Appellate Court was right in dismissing the suit.

Held, also, that the sanction given after appeal did not have a retrospective effect.

THESE were appeals from the judgments of the District Judge of Dacca, dismissing three suits instituted by Durga Kant Roy Chowdhry as manager under the Court of Wards without the order or sanction of the Court.

Appeal 1506.

The first suit, which was one for recovery of possession of land and for mesne profits, was filed on the 10th December 1883 in the Court of the First Subordinate Judge of Dacca on behalf of Dinesh Chunder Roy, a ward of Court, and proceeded to judgment without the sanction or order of the Court of Wards. The suit was partially decreed; and both parties appealed to the District Judge, the plaintiff for that portion of the claim which had been dismissed in the Court of first instance.

At the hearing of this appeal a preliminary objection was taken on behalf of the defendants, respondents, that the suit could not legally be brought without the sanction of the Court of Wards, or the Commissioner to whom the duty of granting sanction in such cases had been delegated. This objection was not taken in the Court of first instance, nor in the grounds of cross-appeal filed on behalf of the respondents; but it was admitted that notice of the objection had been sent by the pleader for the respondents to the pleader for the appellant. On the same day, the 23rd May 1887, an application was filed on behalf of the appellant, accompanied by a letter No. 385 $\frac{\text{M. R.}}{\text{W.}}$ of the 16th May 1887, from the Commissioner of Dacca to the Collector of Mymensingh, giving sanction to the institution of the suit the appeal and all other proceedings connected therewith with retrospective effect from the date of its institution before the Subordinate Judge; and it was suggested that this letter was a sufficient fulfilment of the requirements of the law, and conferred on the Court the power of treating the suit as properly instituted from the beginning.

1888

DINESH CHUNDER ROY v. GOLAM MOSTAPHA.

The District Judge dismissed the suit on the grounds that the terms of s. 55 of the Court of Wards Act, 1879, rendered a suit so coming before him one which he was bound to dismiss, and that the only case in which sanction with retrospective effect, giving validity to proceedings already instituted, could be given was stated in para. 2 of that section.

Appeal 1519.

The second suit, which was for a declaration of right to land, for recovery of possession and for mesne profits, was filed on the 12th January 1885, in the Court of the First Munsiff of Munshigunge, by Durga Kant Roy Chowdhry, as manager, without the sanction or order of the Court of Wards, and also proceeded to judgment without such sanction or order.

On the 16th February 1886, the Munsiff dismissed the suit on the ground that Government being a necessary party had not been made a party to the suit, although an application had been made at a late stage of the case on behalf of the plaintiff for leave to make Government a party. The plaintiff appealed to the District Judge.

At the hearing of the appeal the same objection—the absence of sanction by the Court of Wards to the institution of the suit—was taken on behalf of the respondents; but as the point had not been raised in the Court of first instance, the learned Judge gave the appellant an opportunity of showing "whether in fact any order or sanction had been given," when the following documents were filed on behalf of the appellant:—

(1) A letter from the Commissioner to the Legal Remembrancer, dated the 31st January 1886, a short time before the suit, which was instituted on 12th January 1885, was decided in the lower Court, recommending, at the instance of the Collector of Dacca, that Rs. 39 be allowed for the remuneration of associate pleaders;

(2) The sanction of this payment by the Legal Remembrancer;

(3) A report of the Collector of Mymensingh, dated the 19th March 1886, that he had authorised the filing of an appeal;

(4) The Commissioner's memorandum forwarding copy of the above (3) to the Legal Remembrancer for sanction to the filing of the appeal; and

1888

DINESH CHUNDER ROY v. GOLAM MOSTAPHA.

(5) The Legal Remembrancer's reply to the effect that "as appeal has already been filed, it must be continued."

The Judge held that there was nothing in any of these documents "of the nature of an order of the Court of Wards or of an order of any Government official under the Court of Wards to bring the suit;" and accordingly dismissed the appeal.

Appeal 1507.

The third suit was one for accounts upon an indemnity bond and was filed on 6th October 1885. At the hearing before the Second Subordinate Judge, the same objection, the want of sanction as in the two other suits, was raised on behalf of the defendants. The Subordinate Judge dismissed the suit on the ground that there was nothing to show that the Board of Revenue as Court of Wards had the authority of the Lieutenant-Governor to delegate to the Commissioner the power to order a suit to be brought by a manager on behalf of a ward of the Court. On appeal the District Judge held that the Subordinate Judge was wrong, but dismissed the suit on the ground of want of sanction, and in doing so said: "There arises, however, a further question on which he (the Subordinate Judge) expressed no opinion. Did the Commissioner in fact order the institution of the suit in question? The only document filed on behalf of the plaintiff with reference to this is the document marked Exhibit I., which is a letter from the Legal Remembrancer, giving *his* sanction, and there is nothing to show that any one else gave any order on the subject. Now whatever delegation there may have been to Commissioners, there was none to the Legal Remembrancer, and I am compelled to hold that for want of evidence of any order of the Court of Wards or the Commissioner the lower Court was right in dismissing the suit."

The plaintiff in each suit preferred an appeal to the High Court.

Baboo *Unnoda Prosad Banerjee* for the appellant in the three appeals.

In appeal 1506,—

Baboo *Rash Behary Ghose* and Moulvie *Seraj-ul-Islam* for the respondents.

1888

DINESH CHUNDER ROY v. GOLAM MOSTAFHA.

In appeal 1519,—

Baboo *Rash Behary Ghose* and Baboo *Kashi Kant Sen* for the respondents.

In appeal 1507,—

Baboo *Rash Behary Ghose* and Baboo *Jogesh Chunder Roy* for the respondents.

The arguments sufficiently appear from the judgments of the Court (PIGOT and RAMPINI, JJ.), which were as follows:—

Judgment in appeal 1506.

This is an appeal from a judgment of the District Judge of Dacca, dismissing a suit instituted by a person appointed as manager under the Court of Wards in respect of certain interests, to which we need not refer, relating to property of which he was appointed manager. The suit was dismissed by the District Judge under s. 55 of the Court of Wards Act (Bengal Act IX of 1879) as modified by Bengal Act III of 1881, which adds three words to the section. It is admitted that the suit was filed in the lower Court without the order of the Board of Revenue, or the Court of Wards, or of the Commissioner, and proceeded to judgment in the original Court without any such sanction. The District Judge has held that the terms of s. 55 rendered the suit so coming before him one which he was bound to dismiss; and the appeal is against that decree.

We are of opinion that the District Judge was right in dismissing the suit. The terms of the section are: "No suit shall be brought on behalf of any ward unless the same be authorized by some order of the Court." The additional words added by Act III of 1881 are immaterial for the purposes of this case. It was suggested in the Court below, and it was argued here, that s. 55 is intended for the guidance of managers and not for the purpose of absolutely binding Courts of law in respect of suits by managers on behalf of wards. We have to gather the intention of an enactment from its terms, and though it is quite possible that the effect of this enactment was not sufficiently considered by its framers, we think the words used are such as to leave no alternative but the dismissal of the suit brought

1888

DINESH CHUNDER ROY v. GOLAM MOSTAPHA.

without *some order*, to use the words of the section, of the Court of Wards. "No suit shall be brought" are words as strong as could well be suggested. They are similar to the words used in English Acts which have been so interpreted, as, for instance, in an act of a different character referred to in the case of *Boyce* v. *Higgins* (1). There the words are: "No proceedings shall be taken by any person other than the party grieved without the sanction in writing of the Attorney-General;" and these were held to constitute in that case an absolute ground for holding that the suit could not be brought.

Then it was suggested that, inasmuch as at the hearing of the appeal by the District Judge an application was filed, accompanied by a letter from the Commissioner of Dacca to the Collector of Mymensingh giving sanction to the institution of the suit, that conferred, as in terms it was intended to confer, upon the Court, by the use of the word *retrospective*, the power of treating the suit as properly instituted from the beginning. It was contended that that document entitled, and if it entitled, it bound, the Court to entertain the suit. We think not. It would be a strange construction of the section which would give the department which, under the name of the Court of Wards, carries on the suit through its manager the power of rendering valid after decree proceedings which up to that date were invalid, and so empower it, if it pleased, in the interests of those for whom it managed the estate to affirm or to disaffirm a suit, according as it had or had not resulted in success. On that ground alone we think it would be impossible, in the absence of express words, to hold that, when the matter was before the lower Appellate Court on appeal, a sanction then given should validate the proceedings that had been issued. Further, we think that the view expressed by the learned District Judge, that the second paragraph of s. 55 provides for one case only in which a subsequent sanction is contemplated by the section, is a view entitled to great weight. For these reasons we hold that the learned District Judge was right in dismissing the suit; and we dismiss this appeal with costs.

Appeal dismissed.

(1) 4 C. B., 1.

1888

DINESH CHUNDER ROY v. GOLAM MOSTAPHA.

Judgment in appeal 1519.

This is also an appeal from a decision of the same District Judge, and in this case also the absence of some order by the Court of Wards was raised in the Court of Appeal, and the District Judge, taking the same view, dismissed the suit. In this case the learned Judge had to consider, not merely the effect of the absence of any order authorizing the bringing of the suit, but whether or not there was in existence any order authorizing the bringing of such suit; for it is an unfortunate characteristic of this section which is drawn with singular absence of regard to the rights of third parties who may be affected in costs, at any rate, by its provisions, that nothing is said in the Act as to the form or nature of the order which, under the terms of the section, is made an essential preliminary to the bringing of the suit. The public, the individuals against whom suits may be brought in contravention of the terms of this section, are not in any manner protected from suits being brought loosely and negligently, and in disregard of the provisions of the section, by the enactment of any procedure, with reference to the making or form of the order, such as ought naturally to have been found in the Act. The District Judge says: "All the papers in connection herewith that the pleader is able to show me are: (1) a letter from the Commissioner to the Legal Remembrancer, dated the 31st January 1886, a short time before the suit, which was instituted on the 12th January 1885, was decided in the lower Court, recommending, at the instance of the Collector of Dacca, that Rs. 39 be allowed for the remuneration of associate pleaders; (2) the sanction of this payment by the Legal Remembrancer; (3) a report of the Collector of Mymensingh, dated the 19th March 1886, that he had authorized the filing of an appeal; (4) the Commissioner's memorandum forwarding copy of the above (3) to the Legal Remembrancer for sanction to the filing of the appeal; and (5) the Legal Remembrancer's reply to the effect that 'as appeal has already been filed, it must be continued.' There is nothing in all these of the nature of an order of the Court of Wards, or of an order of any Government official under the Court of Wards, to bring the suit, and I think that this was a fatal objection." Accordingly, the defendant has, in this case,

1888

DINESH CHUNDER ROY v. GOLAM MOSTAPHA.

partly in consequence of the slovenly manner in which the Act was framed, partly in consequence of the manner in which the suit has been instituted, been put to costs and trouble, which probably no order of this Court, even though the suit is dismissed, can recoup him. We agree with the District Judge in the view which he has expressed, and we think he was right in dismissing the suit. The appeal is dismissed with costs.

Appeal dismissed.

Judgment in appeal 1507.

This appeal raises a slightly different question. In this case the original Court dismissed the suit on the ground that there was nothing to show that the Board of Revenue, as the Court of Wards, had the authority of the Lieutenant-Governor to delegate to the Commissioner the power of ordering a suit to be brought by the manager on behalf of a Ward of the Court. There, the learned Judge on appeal holds that the Subordinate Judge was wrong, and we agree with the learned Judge in entertaining that opinion. But while expressing that opinion, the learned Judge considers the question whether in fact there was an order authorizing the institution of the suit, and he says: "The only document filed on behalf of the plaintiff with reference to this is the document marked Exhibit I., which is a letter from the Legal Remembrancer giving *his* sanction, and there is nothing to show that any one else gave any order on the subject. Now, whatever delegation there may have been to Commissioners, there was none to the Legal Remembrancer, and I am compelled to hold that, for want of evidence of any order of the Court of Wards or the Commissioner, the lower Court was right in dismissing the suit." In the two cases with which we have just dealt, the proceedings had gone as far as judgment and decree before the question was raised. Here the question was raised before judgment in the original Court, and the suit was dismissed on the ground of the absence of proof of some order. Now, upon that point we referred the learned pleaders to the case of *Mahammad Azmat Ali Khan* v. *Ladli Begum* (1) before their Lordships of the Privy Council under the Pensions Act, in which they held that, where it appeared in a suit which

(1) I. L. R., 8 Calc., 434.

had been entertained under that Act that the certificate required by its provisions had not been issued, and where the Court stayed the proceedings and abstained from giving final judgment, but upon the filing of the certificate proceeded to give final judgment, the Court was entitled to do so. That case, however, depended, as we understand it, upon the special terms of that Act, s. 6 of which enacts that a Court, on receiving such a certificate, is *bound* to take cognizance of the claim; and their Lordships held that, upon the certificate being filed, the Court finding a pending suit, although irregularly instituted, was bound to take cognizance of the claim in that suit. It is to be observed that s. 4 of that Act, prohibiting a Court from taking cognizance of a suit without a certificate, commences with the words "save as hereinafter provided," which must be taken of course to refer to s. 6 as well as to the other portions of that division of the Act to which it applies. In the present case, too, it does not appear that any application was made to the Second Subordinate Judge to stay proceedings pending the obtaining of a sanction. We think that in this case also the decision of the District Judge was right, and we have only to add that this case again arises in part from the absence from the Act of any attempt at laying down a procedure to be followed with respect to the issue of the order which the Act requires as a preliminary condition to the institution of a suit. We shall bring these cases to the notice of our colleagues in the hope that perhaps some rule may possibly be framed to remedy the consequences, in some measure at least, of the unfortunate drafting of this enactment. We dismiss the appeal with costs.

Appeal dismissed.

C. D. P.